

**DATE:** June 14, 2013

**PROJECT:** HILLMAN RESIDENCE  
1139 SIERRA PLACE  
EDMONDS WA 98020

**OWNER/APPLICANT:** TOM & LIN HILLMAN  
15915 74TH PL W  
EDMONDS WA 98026  
425-745-4669  
[LinHillman@comcast.net](mailto:LinHillman@comcast.net)

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**SUBJECT:** PLN20120033

**APPLICANT'S SURREBUTTAL TO APPELLANTS' ARGUMENTS OF JUNE 12, 2013**

This document is submitted in response to the City Attorney's memo dated June 7, 2013 and the appellants' Reply Brief dated June 12, 2013. Italics for emphasis are ours.

**1. Environmental Preservation of the Wetland**

The primary objection to this project has been the proposed partial encroachment into the wetland, even though it has met the code's critical area review criteria (ECDC 23.40.160) which state it must be shown that “The proposal minimizes the *impact on critical areas* in accordance with ECDC [23.40.120](#), Mitigation sequencing;” “Any *alterations permitted to the critical area are mitigated* in accordance with ECDC [23.40.110](#), Mitigation requirements;” and “The proposal protects the critical area functions and values consistent with the best available science and *results in no net loss of critical area functions and values.*” The mitigation plan was proposed by the qualified wetland biologist, approved by the staff, and its merits not refuted. It goes beyond code

minimums, creating a post-development condition of *increased* functions and values that is an improvement over the present state (0159: WRI report, p. 13, 5<sup>th</sup> paragraph.).

Page 1 of the Hearing Examiner's Final Decision upon Reconsideration stated "... the reasonable use variances are necessary because it is not possible to build a single-family home on the subject lot without encroaching into a wetland and a stream buffer.... (0001: Reconsideration, p. 1, lines 16 – 18).

The proposal uses a "mixture" of the mitigation sequencing preferences (as allowed by ECDC 23.40.120.C.): avoidance for 89% of the wetland, and enhancement of that same 89%, more than enough to offset the loss of function in the other 11%. The code neither mandates a specific mixture ratio, nor when to proceed from one preference to the next. The application of the preferences is site-dependent, and in this case the proposed mixture resulted from consideration of all of the following factors:

- Overlapping critical areas and buffers
- Fish and Wildlife's focus on the riparian corridor (stream buffer) wildlife habitat
- The state Growth Management Act (GMA) and City of Edmonds Comprehensive (Comp) Plan's competing mandates for critical area protection, urban density targets, and aesthetic considerations for single-family housing
- Site slope/drainage aspects, with preservation of an existing drainage ditch
- Storm drainage issues, including setback, slope, and detention pipe volume and burial requirements, catch basin and yard drain placement outside critical areas

- City code requirements for tree retention and protection
- Geotechnical considerations, including a shallow glacial till layer impeding infiltration for low impact development (LID)
- Grading issues, including retaining wall placement and height
- Driveway location, minimum size and minimum/maximum slope criteria

Holding one aspect or issue primary to the exclusion of the other factors can create an extreme that renders the project physically infeasible, especially in the area of drainage. As can be seen from the site plan (0110) and civil plan (0113: Drainage, Grading and TESC plan), keeping the building entirely out of the wetland wouldn't allow room for the 74' long storm detention piping shown. Moving the driveway as far west as possible would drop its elevation to the point where the storm drainage piping is no longer located higher enough in elevation than the outfall location at the stream edge to meet storm drainage slope and cover requirements.

The low-functioning category 3 sloped wetland doesn't retain water for flow control as do flatter type 1 or 2 wetlands (beginning on 0151: WRI report, bottom of p. 5). The Hearing Examiner acknowledged "...the wetland does not have any significant flood storage capacity because of its lack of depressional features and lack of ability to become ponded. The proposed encroachment into the wetland is relatively minor." (0012: Reconsideration, p. 12, lines 12 – 14).

The wetland has a reduced ability to enhance water quality (0152: WRI report, p. 6, Water Quality), low habitat score (same page, Wildlife habitat function), and its overall score of 37 is low on the 31 – 50 scale for category 3 (WRI report, p. 3, second paragraph). The contours on the Lewis site plan (0205), show the flattest (most valuable) part is located further east, away from our proposed building location, part of the large area we proposed to leave undisturbed and enhance (0109: Whole Site Plan), per the wetland biologist's guidance (0007: Reconsideration, p. 7, lines 5 – 7) and Department of Ecology's recommendation for limited development in the least sensitive portions of the property (DOE pub. no. 96-120 “Exploring Wetlands Stewardship”, table 4, p. 34).

Regarding building further north or east, the wetland biologist affirmed it was preferable to preserve the high-priority stream buffer with mature trees rather than the most sloped part of the low-grade wetland (0054-0055: April 4, 2013 letter).

No professional testimony has been provided to refute the wetland biologist's analysis or conclusions. Neither the staff, Hearing Examiner nor appellants have characterized WRI's report as wrong or its mitigation plan as not meeting the “no net loss of functions” standard. There were no appeals to the city's Determination of Non-significance (0238-0239) issued upon our SEPA filing (0214-0237), indicating that the environmental aspects of our proposal are acceptable based on city and state standards.

## **2. Use of the Lot, Size and Placement of the House**

We are not required to consider uses for this RS-12 lot other than a single-family home (0017: Reconsideration, page 17, lines 14 - 16). It is not zoned for either a wood shop or city park (0271: appellants' letter of September 25, 2012, middle of p. 3). The land swap option (0271 and the May 31, 2013 appeal document, middle of p. 5) would typically involve increasing density of development elsewhere, and we own no other undeveloped property, nor are we seeking to build more than one home.

The City Attorney's June 7, 2013 memo stated: "...the primary focus of the appeal.... [is] whether the applicant demonstrated that the proposed impact to the critical areas was the 'minimum necessary to allow for reasonable economic use' as required by ECDC 23.40.210A.2.c." (p. 6, first paragraph), and "The real question, from staff's perspective, and apparently from the hearing examiner's perspective, concerns the footprint and size of that single-family residence. Here, *the code does not provide much guidance.*" (bottom of p. 4).

He continues "...the analysis of the 'minimum necessary' impact prong should more appropriately focus on architectural, and perhaps economic, considerations that are intended to prevent a regulatory taking. While the code makes it fairly clear that, for reasonable use purposes, one should be able to build a single-family home on a conforming single-family lot, it is silent as to how one should determine whether the 'minimum necessary' impact prong has been satisfied. For example, there is no minimum or maximum square footage in the code to help staff or the hearing examiner determine

when a footprint is small enough to be considered the 'minimum necessary.'”

Neither code nor previous variance precedent requires a house footprint *smaller* than what we have proposed. It does not define nor require a *minimum single family residence* or *minimum house size*, nor a *minimum footprint* as suggested by the appellants (May 31, 2013 appeal document, bottom of p. 7), but rather requires that “the approved variance is the minimum necessary to allow the owner the rights enjoyed by other properties in the vicinity with the same zoning.” (ECDC 20.85.010.F.). We have been asked to “prove” something that has no codified criteria for proof, and in that absence, it could never be proven that any given house *was* the minimum.

Absent any more specific guidance, the development standards for RS-12 (ECDC 16.20.030 table) require a *minimum* lot width of 80' with 10' side setbacks, leaving a 60' building width at the street frontage. The Mallot house across the street, previously identified as the smallest house in the immediate vicinity (0271: letter of September 25, 2012, item 6 and elsewhere in the record), enjoys this type of frontage. Without other code direction, this seems a logical building width, and the house we proposed has a 60' frontage (0110: Partial Site Plan), in keeping with the character of the neighborhood, and avoiding a “snout house” where all one sees from the street is garage doors. The proposed garage placement allows for the required 25' minimum distance from the property line to the garage door (0110: Partial Site Plan), and its driveway is high enough in elevation from the stream level to allow for storm drainage (0113: Drainage, Grading and TESC plan).

### 3. Precedents

The appellants claim (brief p. 6, last paragraph): “...the Hachler residence at 1111 Sierra Place, is simply not a precedent. The variance was granted in 1999, five years before the City's current sensitive area ordinance was enacted...”

That house was built under previous critical area regulations enacted May 31, 1992 (city file PLN199900136). The file includes a Reasonable Use Exception and Variance Narrative dated June 28, 1999, referencing then code sections ECDC 20.15B.050(C) Reasonable Use Exception and 20.15B.170A). - Variances. Part of the language required: “The granting of the variance is the *minimum necessary to accommodate the development proposal* and will not be materially detrimental to the public welfare or injurious to the property or improvements in the vicinity and zone in which the property is situated, or contrary to the goals and purposes of this chapter.” The applicant stated that “Moving the home further into the site's northwest corner could reduce critical area impacts beyond the current proposal. However, the home would be deprived any yard at all. It is the applicant's contention that this proposal balances function and preservation and should be approved by the City of Edmonds.” It was. Ours is very similar.

The appellants provided no evidence to support their suggestion that the Lewis variance (PLN 20040008) was “improvidently approved” (bottom of p. 6 of their June 12, 2013 brief). At the time we purchased the lot we could have built under that approved variance (under BLD20100196).

#### 4. Striking a Balance

Edmonds' code states that the definition of “‘reasonable economic use’ shall be liberally construed to protect the constitutional property rights of the applicant.” (0017: Reconsideration, p. 17, lines 1 – 2). We believe this proposal is within our rights, and that it has met “‘minimum necessary” to the extent possible given the ambiguity and non-specificity of the code. It has incorporated “no net loss” of wetland functions, protected the stream and its shade trees, and honored the existing drainage pattern of the site, and we think it should have been approved as submitted without condition #1 (0020).

The code cannot mandate that there never be wetland disturbance at all without potentially violating fifth-amendment property rights. Variances provide for this via exceptions to strict application of regulation for unusual parcels, using discretion on a case-by-case basis, with mitigation for critical area disturbance. Case law affirms that land use decisions must strike a balance between extremes in the interest of fairness. The extremes are no development on the one hand, and no environmental protection on the other, and this proposal achieves a balance between the two.

In their June 12, 2013 brief the appellants said the statutes relating to land use should be considered as a whole, but then focused on meeting the intent of just Title 23. While critical areas sections of the code were enacted as a way for the city to protect its natural resources, the variance provisions were included as a way for the city to protect the rights of its landowners. The variance section *inside* the critical areas part of the code (23.40.210), clearly shows the intent to *allow* for critical area variances, not categorically



*deny* them. They serve a desired and necessary function: to strike a balance between natural resource protection and an owner's rights to reasonable use of land.

As the City Attorney points out (bottom of p. 17) in the *Lake Lawrence* case, “the...decision does not deny to respondent all reasonable profitable uses, but only requires that the use be adapted to protect an important environmental resource.” The approval of our variance does that, allowing us a reasonable house, but with location and size compromises in deference to the critical areas, combined with mitigation to produce no net loss of functions.

**5. Suggested Modification to Wording of Condition #1 (0020).**

Objection was raised to approval condition #1's wording, claiming it leaves the decision open to future actions by the wetland biologist and city staff which could not then be appealed (May 8, 2013 appeal document, bottom half of p. 2 and City Attorney's June 7, 2013 memo, p. 11 “procedural concerns”). Although we favor the total elimination of condition #1, in the interest of saving time and adding both clarity and finality, we would be open to having that portion of the wording removed as follows below, provided the appellants also agree.

If the council decides not to uphold the Hearing Examiner's decision with its conditional wording as-is, we propose the following modification to condition #1.

Condition #1:

1. ~~As discussed in FOF No. 6, staff shall consult with a qualified wetland biologist, who can be Andrea Bachman, to determine whether removing the proposed wetland encroachment would appreciably improve upon impacts to wetland functions. If there is any appreciable environmental benefit to avoiding the proposed wetland encroachment, The building footprint for the home, inclusive of the garage, will be limited to the squared building space (including the west bay window) depicted in Ex. 4, Sheet 2, excluding the garage area and the room appended to the north of the garage to the extent it encroaches into the wetland. The southeast wetland encroachment of this living space is authorized. The driveway shall be located outside the wetland. Retaining walls may be built into the wetland to the extent necessary to support the home and driveway. If the driveway cannot be built to City standards without encroaching more than a foot into the wetland, the applicants may build the home as proposed with the 1,790 square foot encroachment. The building and driveway edges shall be placed no further eastward into the wetland from this squared-off line than is necessary to meet the storm drainage system's minimum requirements, and in no case further eastward than originally proposed.~~

This provides a measurable boundary for the building footprint at the squared-off wetland edge that is identifiable and enforceable by the city staff and not subject to further investigation by the wetland biologist, yet still recognizes that the driveway and garage placement will be dictated by drainage constraints (and that the difference between building encroachment and driveway encroachment has not been at issue).

The Hearing Examiner said that “If only a buffer encroachment were proposed, as opposed to encroachment into the wetland itself, the size of the proposed home would clearly be considered a minimum variance request given the larger sizes of surrounding homes.” (as quoted in City Attorney's June 7, 2013 memo, p. 7, third paragraph). Squaring off the wetland edge effectively accomplishes this using his wording.

It also addresses the appellants' wish that: “On the basis of the record as it exists, we are asking the City Council to reverse the granting of the variance to the extent that it allows incursions into the wetland itself.” (brief of June 12, 2013, top of p. 3).

While we lose footprint area and building height in this decision, we feel this modification, and its mutual acceptance, will provide certainty.

## **Summary**

We respectfully request that the council uphold the Hearing Examiner's decision of conditional approval, with or without condition #1 (with or without our suggested modification).

We believe the foregoing to be true.

We thank the council for their time and consideration.

A handwritten signature in dark ink, appearing to read "Tom Hillman", with a long horizontal flourish extending to the right.

Tom and Lin Hillman, Applicants